NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. LUIS AGUILAR, aka Francisco Pena; aka Francisco Cuevas Pena aka Juan Sanchez-Zaragosa; aka Luis Aguilar-Zaragosa, Defendant - Appellant.	No. 07-10346 D.C. No. CR-06-00123-LJO MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Lawrence J. O'Neill, District Judge, Presiding

Argued and Submitted July 14, 2008
San Francisco, California

Before: HUG, PAEZ, and BERZON, Circuit Judges.

Luis Aguilar ("Aguilar") appeals his conviction and sentence for illegal reentry after deportation, in violation of 8 U.S.C. § 1326. Aguilar contends that the district court improperly instructed the jury and mishandled questions from the

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

jury. He also challenges a series of the district court's discovery and evidentiary rulings, including the admission of evidence of his prior convictions. Finally, Aguilar appeals his sentence as unreasonable and improper given the circumstances of his case. We affirm the district court's jury instructions and affirm in part the district court's discovery and evidentiary rulings. However, we reverse the district court's admission of evidence of Aguilar's prior convictions and therefore vacate his conviction and remand for a new trial. Accordingly, we do not review the district court's handling of the jury questions or Aguilar's sentence.

We review the district court's evidentiary rulings for abuse of discretion, *United States v. Alviso*, 152 F.3d 1195, 1198 (9th Cir. 1998), and review allegations of *Brady* violations *de novo*. *United States v. Holler*, 411 F.3d 1061, 1066 (9th Cir. 2005).

Jury Instructions

1. The district court did not improperly refuse to instruct the jury on 8 U.S.C. § 1325 as a lesser-included offense of 8 U.S.C. § 1326. Section 1325 requires elements that § 1326 does not and so is not a lesser-included offense of §

1326. Therefore, Aguilar was not entitled to the instruction. *See United States v. Flores-Peraza*, 58 F.3d 164, 166-68 (5th Cir. 1995).

2. The district court adequately instructed the jury even though it failed to define "removal." Although the § 1326 element of "removal" includes physical removal, *see United States v. Bahena-Cardenas*, 411 F.3d 1067,1074 (9th Cir. 2005), Aguilar never argued that he was ordered deported but did not physically leave. As the issue was not fairly presented by the evidence, there was no reason to instruct the jury on it. *See United States v. Wilcox*, 919 F.2d 109, 113 (9th Cir. 1990).

Discovery and Evidentiary Rulings

1. The district court did not violate Aguilar's rights under *Brady v. Maryland*, 373 U.S. 83 (1963), when it denied discovery pertaining to the government's maintenance and use of immigration records. To prevail on a *Brady* claim, Aguilar must show that the information sought was sufficiently material to his defense such that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). Mere speculation as to the

materiality of the immigration records is insufficient. *See Barker v. Fleming*, 423 F.3d 1085, 1099 (9th Cir. 2005).

Here, Aguilar has not offered more than mere speculation that withheld information about the immigration records would have resulted in a different verdict, particularly given his ability to inquire into the record-keeping procedures on cross-examination. Accordingly, we deny this claim.

2. The district court's certification of the government's witness as an expert in fingerprint analysis and the admission of fingerprint evidence were not improper. The district court properly found the government's expert sufficiently qualified to testify as an expert in fingerprint analysis. Moreover, we have recently stated that "the reliability and admissibility of [inked fingerprints] is long-established," *United States v. Calderon-Segura*, 512 F.3d 1104, 1109 (9th Cir. 2008), and find no reason to deviate from this determination.

3. The admission of Aguilar's Alien-Registration Files ("A-Files") under the public records hearsay exception was not an abuse of discretion. That there were multiple A-Files does not necessarily indicate that the files lacked indicia of trustworthiness, as Aguilar's use of multiple aliases explains the multiplicity. Although it is questionable whether the A-File relating to the 1998 removal

correctly identified Aguilar, any error by the district court in admitting it was harmless, as the jury did not find that Aguilar was the alien named in that A-File.

Aguilar also urges the court to overrule *United States v. Bahena-Cardenas*, 411 F.3d 1067 (9th Cir. 2005), and hold that admission of immigration records violates the Confrontation Clause under *Crawford v. Washington*, 541 U.S. 36 (2004). As we are bound by *Bahena-Cardenas*, we hold that immigration records are not "testimonial," and are thus admissible.

4. The district court did not err by precluding Aguilar from presenting evidence about a shredding incident at an INS facility. The incident was only slightly relevant to Aguilar's case, and he had ample opportunity to present other evidence challenging the government's record-keeping practices. The district court's ruling that the risk of confusing the jury outweighed the minimal probative value of the evidence was not an abuse of discretion. *See United States v. Sua*, 307 F.3d 1150, 1153 (9th Cir. 2002).

5. The district court improperly admitted evidence of Aguilar's prior convictions.

The parties agreed before trial that the convictions would not be presented to the jury. Only after Aguilar challenged the government's INS files, arguing that

they were not his files, did the government seek, and the district court allow, admission of his prior convictions.

The probative value of the conviction documents was minimal. They linked, by alias and fingerprint identification, the convictions to specific INS files and the deportation orders therein. But the deportation orders still had to be linked back to Aguilar. Thus, the conviction documents provided only slight reinforcement of the evidence linking Aguilar to the INS files. On the other hand, they were highly prejudicial. *See Thompson v. Borg*, 74 F.3d 1571, 1579 (9th Cir. 1996) (Reinhardt, J., dissenting) ("We have consistently held that information regarding a defendant's prior convictions is *highly prejudicial*.") (emphasis in original).

The district court allowed the convictions into evidence on the ground that Aguilar had opened the door to such evidence by arguing that the INS files were not his. However, a defendant does not open the door to otherwise-inadmissible evidence simply by proffering a theory of the case that could be rebutted by such evidence. *See United States v. Sine*, 493 F.3d 1021, 1037-38 (9th Cir. 2007). It thus was an abuse of discretion to admit the prior convictions under Fed. R. Evid. 403.

Although the admission of the prior convictions may well have been harmless, the government did not so argue on appeal. It has thus waived the

argument. *United States v. Gonzalez-Flores*, 418 F.3d 1093, 1100 (9th Cir. 2005). This is not one of the exceptional cases in which "the harmlessness of the error is not reasonably debatable." *Id.* at 1101; *see also United States v. Jimenez-Ortega*, 472 F.3d 1102, 1104 n.2 (9th Cir. 2007) (per curiam). We therefore vacate the conviction and remand for a new trial.

REVERSED in part and REMANDED.